

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

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FILE: B-216250

DATE: September 24, 1984

MATTER OF: John C. Holland Enterprises

DIGEST:

1. Under applicable Federal Acquisition Regulation, the agency properly could rely on a Small Business Administration regional administrator's determination that a firm was small and award contract to that firm notwithstanding protester's subsequent appeal of regional administrator's decision which reversed initial ruling.
2. Allegation that awardee lacks integrity constitutes a protest against an affirmative determination of responsibility which our Office will not review in the absence of a showing of fraud or bad faith on the part of the contracting officer or a failure to apply definitive criteria of responsibility.

John C. Holland Enterprises (JCH) protests the award of a garbage disposal contract to J.P. Mascaro & Sons, Inc. (Mascaro), under invitation for bids (IFB) No. N64270-83-B-7566, issued by the Department of the Navy as a small business set-aside. JCH contends that the Navy awarded the contracts despite a final ruling by the Office of Hearings and Appeals of the Small Business Administration (SBA) that Mascaro was not a small business concern. JCH further asserts that the fact that Mascaro improperly represented itself to be a small business on its bid and the fact that Mascaro has been convicted of fraudulent criminal activity involving its business show that Mascaro lacks integrity and should be found nonresponsible and, thus, ineligible for award.

We summarily deny the protest in part and dismiss it in part.

Mascaro was the low bidder and JCH states that it protested to the agency on April 9 and May 7. On May 21, 1984, the Navy advised JCH that it was awarding the contract to Mascaro. On May 24, 1984, JCH again protested to the

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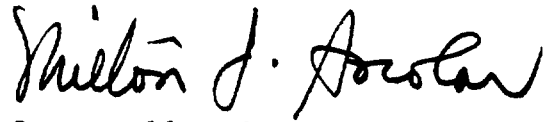
Navy any award to Mascaro and sent a copy of this letter to our Office. In this letter, JCH specifically indicates that the contract was awarded to Mascaro on the basis of an initial determination by the SBA regional administrator that Mascaro was a small business prior to JCH's filing of its appeal of this SBA determination.

In this connection, the Federal Acquisition Regulation (FAR) § 19.302(h)(1), 48 Fed. Reg. 41102, 42246 (1983) (to be codified at 48 C.F.R. § 19.302(h)(1)), states that where the contracting officer is notified timely of a size status protest prior to award, the contracting officer shall not award the contract until the SBA has made a size determination or 10 business days have expired since SBA's receipt of a protest, whichever occurs first. The FAR also states that the SBA regional administrator's decision is final unless appealed and the contracting officer is notified of the appeal before award. If an award is made before the time the contracting officer received notice of the appeal, the contract shall be presumed to be valid. FAR § 19.302(g)(2), 48 Fed. Reg. 41102, 42246 (1983) (to be codified at 48 C.F.R. § 19.302(g)(2)).

In view of the FAR requirements, we find nothing improper in the Navy's award to Mascaro. The agency need only wait 10 days or until the initial SBA ruling, whichever occurs first, before awarding a contract. There is no obligation that an agency withhold award because of an appeal from an initial size status determination and, in fact, the agency may presume the initial SBA ruling is final unless it is notified of an appeal. Here, JCH concedes that the award was made on the basis of the initial SBA decision that Mascaro was small before JCH exercised its appeal rights. In similar circumstances, we have found such an award legally unobjectionable. See J.R. Youngdale Construction Co. and John R. Selby, Inc., B-214448, B-214484, Mar. 13, 1984, 84-1 C.P.D. ¶ 306.

The allegation that Mascaro lacks integrity constitutes a challenge to an affirmative determination of responsibility which our Office will not review in the absence of fraud or bad faith on the part of the procuring official, or a failure to apply definitive responsibility criteria. See

Moore Service, Inc., B-212054, Dec. 6, 1983, 83-2 C.P.D.
¶ 648. JCH has neither alleged nor shown any of the
exceptions. Accordingly, we dismiss this aspect of JCH's
protest.

for 
Comptroller General
of the United States